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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

GEORGE B. NOBLE AND PATRICIA L.
NOBLE,

Plaintiff,

v.

CALIBER HOME LOANS, INC.; U.S. BANK
TRUST, N.A. AS TRUSTEE FOR LSF9
MASTER PARTICIPATION TRUST; LSF9
MORTGAGE HOLDINGS, LLC; CLEAR
RECON CORP.; BANK OF AMERICA,
N.A.; and DOES 1-10, INCLUSIVE,

Defendants

Case No. 4:17-cv-01053-CW

**PLAINTIFFS' OPPOSITION TO
DEFENDANT BANK OF AMERICA,
N.A.'S MOTION TO DISMISS
COMPLAINT**

Hearing: June 13, 2017
Time: 2:30 p.m.
Place: Courtroom 2 – 17th Floor

Hon. Claudia Wilken

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs GEORGE B. NOBLE AND PATRICIA L. NOBLE ("Plaintiffs") hereby submits this opposition to Defendants BANK OF AMERICA, N.A.'s ("BANA" or "Defendant") Motion to Dismiss Plaintiff's Complaint ("Motion"). Plaintiffs maintain that they have stated valid claims for wrongful foreclosure, violations of the California Homeowner Bill of Rights ("HBOR"), and violations of the Real Estate Settlement Procedures Act ("RESPA") by Defendants. Plaintiffs' Complaint alleges multiple, specific factual bases indicating that Defendant violated RESPA provisions requiring them to respond to Plaintiffs' requests for information as well as HBOR provisions requiring the recordation of foreclosure documents that are accurate, reliable and supported by competent evidence. As such, Defendants' Motion should be denied.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs' Complaint ("Complaint") arises out of Defendants' violations of provisions of the Real Estate Settlement Procedures Act ("RESPA") and the wrongful actions taken by Defendants in their attempts to foreclose upon real property purchased by Plaintiffs. On or around 2007, Plaintiffs took out a loan with the now-defunct Countrywide Home Loans, Inc. ("Countrywide") secured by real property located at 56 Hennessey Ridge Road, St. Helena, California 94574 ("Subject Property").

On or around November 22, 2011, Mortgage Electronic Registration Systems, Inc. ("MERS") recorded a Corporation Assignment of Deed of Trust, assigning all beneficial interest in Plaintiffs' DOT together with the note to Defendant Bank of America, N.A. ("BANA" or "Defendant"). On or around November 6, 2014, Michael D. Fitts as a purported "Assistant Vice President" of BANA executed an Assignment of Deed of Trust in which BANA purported to assign all beneficial interest in Plaintiffs' DOT to LSF9 Mortgage Holdings, LLC. Though "Bank of America, N.A." was printed on the signature line of the Assignment of Deed of Trust, "Michael D. Fitts" and "Assistant Vice President" were handwritten on the document.

1 On November 7, 2014, Plaintiffs sent BANA a qualified written request for information
2 under 12 U.S.C. 2605(e) and 12 C.F.R. 1024.36. Among other things, Plaintiffs sought
3 information relating to the identity of the owner of their mortgage; the transfer history of their
4 loan; and their servicing file. BANA's response to Plaintiffs' request for information ("RFI")
5 contained numerous deficiencies, including but not limited to the following: BANA failed to
6 supply Plaintiffs with the name, address and telephone number of the trustee overseeing the
7 issuing entity; BANA failed to supply Plaintiffs with the name, address, telephone number, and
8 position of an officer under the trustee's employ; and BANA did not provide Plaintiffs with a
9 loan identification number that was assigned to their loan and through which the trustee would
10 recognize Plaintiffs' loan account.

11 BANA also refused to supply information relating to the transfer history of Plaintiffs'
12 loan by failing to respond to Plaintiffs' request for the MERS MIN Summary and a MERS
13 Milestones Report. This is despite the fact that Plaintiffs informed BANA in its RFI that
14 Plaintiffs were unable to find their loan on the MERS system using the MIN number listed on
15 their Deed of Trust.¹ BANA's response to Plaintiffs' request for information regarding their
16 servicing file was also incomplete. Among other things, BANA refused to send a servicing file
17 that reflected the most recent data and sent outdated servicing notes that did not even reflect the
18 fact that Plaintiffs had engaged BANA for loss mitigation review. Some information and
19 documents provided only covered activity on Plaintiffs' account up to January 1, 2014.

20 On or around November 6, 2014, BANA also recorded an assignment of Plaintiffs' deed
21 of trust, purporting to transfer all beneficial interest to the LSF9 Master Participation Trust. This
22 assignment was executed by Michael D. Fitts, who purported to be an "Assistant Vice President"
23 of BANA when, in fact, he is listed as a Foreclosure Specialist on his online LinkedIn profile
24 page. Plaintiffs allege on information and belief that the LSF9 Master Participation Trust was
25

26 ¹ Though Plaintiffs were able to find what appeared to be their Deed of Trust on the MERS system by performing a
searching using George Noble's social security number and property zip code, the record number associated with
that MIN was *not* the MIN listed on Plaintiffs' Deed of Trust.

1 merely a participation agent to the securitization of Plaintiffs' loan. As such and based on an
2 investigation Plaintiffs had conducted on the ownership of their loan, Plaintiffs further allege that
3 the LSF9 Master Participation Trust is not the beneficiary of Plaintiffs' deed of trust because it
4 does not own the entirety of Plaintiffs' loan but rather only a forward interest in its servicing
5 rights. Notwithstanding this fact, the LSF9 Master Participation Trust has been attempting to
6 foreclose on the Subject Property. On or around, February 10, 2017, Plaintiffs received a notice
7 of trustee's sale.

8 **III. STANDARD OF REVIEW**

9 Under Federal Rule of Civil Procedure 12(b)(6), a Motion to Dismiss tests the ability of a
10 complaint to allege facts sufficient to state a plausible claim for relief. *Bell Atlantic Corp. v.*
11 *Twombly*, 550 U.S. 544, 557 (2007). A complaint that contains sufficient factual allegations "to
12 raise a right to relief above the speculative level" will survive a motion to dismiss. *Id.* A
13 complaint must state a claim that is facially plausible, requiring facts showing more than a sheer
14 possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 129 U.S. 1937, 1949 (2009).
15 "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
16 draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In
17 evaluating whether a complaint meets this standard, the court is not required to assume the truth
18 of Plaintiff's legal conclusions but must take Plaintiff's factual allegations as true, and then
19 "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 1950.

20 **IV. DISCUSSION**

21 **A. Plaintiffs' Claims Are Not Barred by Res Judicata**

22 Contrary to Defendant's assertion in its Motion, Plaintiffs' claims are not barred by *res*
23 *judicata*. First, Defendants do not even apply the correct standard to determine if Plaintiffs'
24 claims are barred, choosing to adopt some hybrid of a twenty-year-old California *res judicata*
25 standard and the currently prevailing "primary rights" doctrine. Moreover, when discussing the
26 "primary rights" analysis within the context of the "identity of claims" prong of the old estoppel
standard, Defendant errs in both its analysis and its conclusion. Finally, even under the terms of

1 the standard referenced by Defendant, it is clear that Plaintiffs are not estopped from bringing
2 their current claims.

3 To determine the preclusive effect of a state court judgment federal courts look to state
4 law. *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir.1993).
5 “California’s res judicata doctrine is based on a primary rights theory.” *Manufactured Home*
6 *Communities, Inc. v. City of San Jose*, 420 F.3d 1022, 1032 (9th Cir. 2005). As explained by the
7 California Supreme Court, the primary rights theory “[p]rovides that a ‘cause of action’ is
8 comprised of a ‘primary right’ of the plaintiff, a corresponding ‘primary duty’ of the defendant,
9 and a wrongful act by the defendant constituting a breach of that duty.” *Mycogen Corp. v.*
10 *Monsanto Co.*, 28 Cal.4th 888, 904 (2002). “The most salient characteristic of a primary right is
11 that it is indivisible: the violation of a single primary right gives rise to but a single cause of
12 action.” *Id.* Put another way, “one injury gives rise to only one claim of relief.” *See Lincoln*
13 *Prop. Co. N.C., Inc. v. Travelers Indem. Co.* (2006) 137 Cal.App.4th 905, 912.

14 In interpreting the primary rights doctrine, California courts have further, explicitly stated
15 that merely alleging that the same facts are involved in both suits is neither conclusive nor
16 determinative of the “primary rights” analysis. *San Diego Police v. San Diego Retirement*
17 *System*, 568 F. 3d 725, 734 (9th Cir. 2009). To the contrary, “different primary rights may be
18 violated by the same wrongful conduct.” *Id.*; see also *Agarwal v. Johnson*, 25 Cal.3d 932, 954-
19 955 (1979) (seminal California Supreme Court case holding that the same wrongful conduct
20 gave rise to both independent federal statutory rights and to state law tort causes of action);
21 *Branson v. Sun-Diamond Growers of Cal.*, 24 Cal.App.4th 327, 342 (1994) (explaining that there
22 could be situations where separate and distinct primary rights could be invaded by one and the
23 same wrong and distinguishing statutory rights from contractual or quasi-contractual rights). In
24 these cases, two causes of action would result. *Branson, supra*, 24 Cal.App.4th at 342, citing
25 Pomeroy, Code Remedies, § 350, p. 535.

26 Applying these principles to the case at bar, it is clear that Plaintiffs’ present claims are
not barred by their previous state court lawsuits as neither of their previous claims involved the

1 same primary rights. Plaintiffs' present Complaint sounds in Defendants' violations of
2 requirements placed upon them by the Real Estate Settlement Procedures Act ("RESPA") as
3 codified in 12 U.S.C. 2605 and in Defendants' attempts to foreclose on Plaintiffs' home despite
4 lacking standing to do so. At issue in these claims are: (1) Plaintiffs' rights under 12 U.S.C. 2605
5 to receive timely and responsive responses to the qualified written requests ("QWRs") they
6 propounded on Defendants; and (2) Plaintiffs' rights to not be foreclosed upon by entities that
7 lack standing to do so. Significantly, each of the rights invoked by Plaintiffs in their Complaint
8 are distinct from the rights invoked in their previous state court lawsuits.

9 On April 7, 2015, Plaintiffs filed a complaint in Napa County Superior Court, Case No.
10 26-66217, seeking to exercise their right to rescind their loan under 15 U.S.C. § 1635(a).
11 Plaintiffs also invoked various rights under the California Homeowner Bill of Rights ("HBOR"),
12 enacted by the California Legislature, in 2013 – including their right to a single point of contact
13 in a loan modification review, their right to receive certain documentation informing them of
14 their right to request documents from their mortgage servicer, their right to not be dual tracked
15 by their servicer during the pendency of a loan modification review, and their right to have their
16 mortgage servicer document its right to foreclose. *See* Exh. E to Defendants' Request for Judicial
17 Notice In Support of Motion to Dismiss ("Def. RJN"). None of these rights are at issue in the
18 present case. The only right at issue which may connote a possibility of overlap is Plaintiffs'
19 right to be free from the practice of robo-signing under California Civil Code Section 2924.17
20 ("Section 2924.17"). However, even with respect to this right, what was litigated in the 2015
21 lawsuit was the execution of a substitution of trustee that took place on April 4, 2014. In contrast,
22 the robo-signing at issue in the present case was the Assignment of Deed of Trust purportedly
23 executed by Defendant BANA in favor of Defendant LSF9 Mortgage Holdings, LLC, on
24 November 6, 2014. As such, though the primary right at issue was the same, there were two
25 distinct and separate legal wrongs – Defendants' violation of Section 2924.17 when they
26 executed the substitution of trustee and its violation of Section 2924.17 when they executed an
assignment of deed of trust. This gave rise to *two causes of action*. *See Branson, supra*, 24

1 Cal.App.4th at 339 (discussing situations where a single primary right could be invaded by two
2 distinct and separate legal wrongs thereby yielding two causes of action).

3 Similarly, on August 24, 2015, Plaintiffs brought another state court lawsuit when, during
4 the pendency of an active loan modification review, Defendants dual tracked their loan by
5 continuing to proceed with foreclosure proceedings on Plaintiffs' home. *See* Def. RJN, Exh. G.
6 These were the only facts at issue in Plaintiffs' second lawsuit and the primary right at issue was
7 Plaintiffs' right to be free from such conduct under California Civil Code Section 2923.6
8 ("Section 2923.6") – the HBOR provision that prohibits dual tracking. Neither the facts nor the
9 primary rights at issue in that lawsuit are identical to those raised in Plaintiffs' present claims. As
10 such, this lawsuit does not serve to bar Plaintiffs' Complaint on *res judicata* grounds either.

11 Finally, even putting the primary rights analysis aside, application of Defendant's hybrid
12 old-*res judicata* standard and primary rights analysis, would nonetheless yield the same result.
13 Defendant's *res judicata* standard requires that the claims brought in a subsequent lawsuit be
14 *identical* to the claims litigated in the prior proceeding. Employing the "primary rights" analysis
15 under this prong, Defendant argues that because the prior actions involved the "same Loan
16 secured by the same Property," there was an identity of claims between those lawsuits and the
17 present one. Defendant's analysis utterly fails to engage in any discussion of the rights at issue in
18 the present matter as compared to the previous actions and its eagle's eye view of the "same
19 Loan secured by the same Property" is likely made in view of Defendant's knowledge that its *res*
20 *judicata* argument would fail under a proper "primary rights" analysis. The mere fact that
21 Plaintiffs' claims relate in some broad way to Plaintiffs' property on which Plaintiffs took out a
22 loan, is completely insufficient to establish that the claims litigated in the prior actions involved
23 the same rights at issue here. When looking at the rights that were litigated, it is clear that neither
24 of Plaintiffs' prior lawsuits litigated the issue of Defendants' RESPA violations nor the issue of
25 Defendants' attempts to wrongfully foreclose on Plaintiffs' home.

26 As such, Plaintiffs' claims are not barred by *res judicata* and Defendants' Motion should
be denied.

1 **B. Plaintiffs Have Stated Facts Sufficient to State a Claim for RESPA Violations**

2 Plaintiffs' Complaint has stated facts sufficient to state causes of action for Defendant's
3 violations of 12 U.S.C. § 2605 ("RESPA" or "§ 2605"). As stated in Plaintiffs' Complaint, on
4 November 7, 2014, Plaintiffs submitted qualified written requests ("QWRs"), also known as
5 requests for information ("RFI"), to Defendant BANA, pursuant to RESPA and 12 C.F.R.
6 1024.36. Under § 2605(e), if any "servicer of a federally related mortgage loan receives a
7 qualified written request from the borrower (or an agent of the borrower) for information relating
8 to the servicing of such loan, the servicer shall provide a written response acknowledging receipt
9 of the correspondence within 5 days," and, not later than 30 days after receipt of the QWR,
10 "provide the borrower with a written explanation or clarification that includes – (i) information
11 requested by the borrower or an explanation of why the information requested is unavailable or
12 cannot be obtained by the servicer; and (ii) the name and telephone number of an individual
13 employed by, or the office or department of, the servicer who can provide assistance to the
14 borrower." 12 U.S.C. § 2605(e)(1) and (2). In pertinent part, RESPA defines a QWR as "written
15 correspondence...that (i) includes, or otherwise enables the servicer to identify, the name and
16 account of the borrower; and (ii)... provides sufficient detail to the servicer regarding other
17 information sought by the borrower." 12 U.S.C. (e)(1)(B).

18 In determining whether or not a request is a QWR that will trigger a servicer's §2605(e)'s
19 duty to respond, the Ninth Circuit has followed the precedent set in the Seventh Circuit decision
20 in *Catalan v. GMAC Mortgage Corp.*, 629 F.3d 676 (7th Cir.2011), in holding that "RESPA
21 does not require any magic language before a servicer must construe a written communication
22 from a borrower as a qualified written request and respond accordingly." *Medrano v. Flagstar*
23 *Bank, FSB*, 704 F.3d 661, 666 (9th Cir. 2012). Rather, so long as a borrower's written inquiry
24 "(1) reasonably identifies the borrower's name and account, (2) either states the borrower's
25 'reasons for the belief ... that the account is in error' or 'provides sufficient detail to the servicer
26 regarding other information sought by the borrower,' and (3) seeks 'information relating to the
servicing of [the] loan,'" it triggers the servicer's obligation to respond. *Id.*

1 Plaintiffs' QWR identified the borrower's name and account, provided sufficient detail to
2 BANA regarding the information Plaintiffs were seeking and also sought information related to
3 the servicing of the loan, including information related to the transfer history of Plaintiffs' loan
4 and Plaintiffs' servicing file. As such, Plaintiffs' request clearly met the requirements for a QWR
5 as set forth by the Ninth Circuit in *Medrano, supra*. Defendants' Motion notably does not deny
6 that it provided incomplete responses to Plaintiffs' November 7, 2014 QWR. Rather,
7 Defendant's entire argument hinges on the form of Plaintiffs' request. As such, Defendant's
8 argument fails and its Motion should be denied.

9 Defendant also errs in its contention that there is no private right of action under RESPA
10 and that Plaintiffs did not establish pecuniary damages as a result of Defendant's RESPA
11 violation. Contrary to Defendant's argument, under 12 U.S.C. § 2605(f), Congress clearly
12 established a private right of action under the RESPA statute, stating: "Whoever fails to comply
13 with any provision of this section shall be liable to the borrower for... (A) any actual damages to
14 the borrower as a result of the failure; and (B) any additional damages, as the court may allow, in
15 the case of a pattern or practice of noncompliance with the requirements of this section, in an
16 amount not to exceed \$2,000." 12 U.S.C. 2605(f)(1)(A)-(B). Such language clearly establishes a
17 private right of action for borrowers for servicer violations under the provision of this statute.

18 Plaintiffs also suffered damages in the form of payments made to parties who are not true
19 owners of Plaintiffs' mortgage. As alleged in Plaintiffs' Complaint, the LSF9 Master
20 Participation Trust (the purported transferee of Plaintiffs' loan) was merely a participation agent
21 to the securitization of Plaintiffs' loan. As such and based on an investigation Plaintiffs had
22 conducted on the ownership of their loan, Plaintiffs further allege that the LSF9 Master
23 Participation Trust is not the beneficiary of Plaintiffs' deed of trust because it does not own the
24 entirety of Plaintiffs' loan but rather only a forward interest in its servicing rights. To the extent
25 Plaintiffs made payments to the LSF9 Master Participation Trust despite the trust's lack of true
26 ownership of Plaintiffs' loan, Plaintiffs suffered pecuniary damages in making payments to an
entity not entitled to receive payments. Such damages would not have been suffered had BANA

1 properly provided the transfer history of Plaintiffs' loan to Plaintiffs in response to their valid
2 QWR request.

3 Defendant's arguments to the contrary are in error and its Motion should be denied.

4 **C. Plaintiffs Have Stated Facts Sufficient to State a Cause of Action for**
5 **Violations of California Civil Code § 2924.17**

6 As with Defendant's arguments with respect to Plaintiff's wrongful foreclosure claim,
7 Defendants move to dismiss Plaintiff's claim for violation of California Civil Code Section
8 2924.17 ("Section 2924.17") on the grounds that Plaintiffs did not allege their property had been
9 sold in foreclosure and also did not contest that they defaulted on their loan.

10 Each of these facts are completely irrelevant to the issue of whether or not Plaintiffs
11 stated a sufficient claim under Section 2924.17, which does not require, in any way, shape or
12 form that Plaintiffs make the type of allegations Defendants are purporting are required. Under
13 Section 2924.17, it is sufficient for Plaintiffs to merely allege that a document recorded in
14 "connection with a foreclosure... be accurate and complete and supported by competent and
15 reliable evidence." Cal. Civ. Code § 2924.17(a). Plaintiffs more than met this requirement when
16 they alleged in their Complaint that BANA executed and recorded an assignment of deed of trust
17 on November 6, 2014, in which an alleged "Assistant Vice President" of BANA (Michael D.
18 Fitts) – who was actually a Foreclosure Specialist – purported to assign all beneficial interest in
19 Plaintiffs' Deed of Trust to LSF9 Mortgage Holdings, LLC. Complaint, ¶ 44. This is despite the
20 fact that an investigation Plaintiffs had conducted on the ownership of their loan later revealed
21 that the LSF9 Master Participation Trust is not the beneficiary of Plaintiffs' deed of trust because
22 it does not own the entirety of Plaintiffs' loan but rather only a forward interest in its servicing
23 rights. Complaint, ¶ 26.

24 As such, BANA violated Section 2924.17 when it recorded an assignment of deed of trust
25 stating that LSF9 Master Participation Trust was the new owner of all beneficial interest in
26 Plaintiffs' deed of trust. BANA does not present any argument stating otherwise and its Motion

1 should therefore be denied.

2 **V. CONCLUSION**

3 Based on the foregoing, Plaintiffs respectfully request that the Court deny Defendants'
4 Motion to Dismiss Plaintiff's Complaint in its entirety or grant leave to amend if the Motion to
5 Dismiss is granted.

6
7 DATED: May 12, 2017

Respectfully submitted,

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9
10 /s/ Clarisse Chung_____

11 Clarisse Chung
12 Crossroads Legal Group
13 Michael Yesk
14 Yesk Law
15 Attorneys for Plaintiffs
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